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Supreme Court, U.S.
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No. 95-1119

In The

Supreme Court of the United States

October Term, 1995

CITY OF BLUE SPRINGS, MISSOURI, *et al.*,

Petitioners,

vs.

RONALD KINCADE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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34 pp

QUESTIONS PRESENTED FOR REVIEW

I. Does a public employee's verbal report to his supervisors on a topic of potential interest to the public, made in the course of responding to a specific work assignment, necessarily constitute speech made "as a citizen" and "upon matters of public concern" protected by the First Amendment under *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983)?

II. Because the protected status of a public employee's verbal report to his supervisors, made as a job assignment, is not "clearly established," does this Court's decision in *Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam), compel a grant of qualified immunity to government officials prior to trial?

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APPENDIX

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OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

At the time Petitioners filed their appeal with the Eighth Circuit Court of Appeals on issues of whether Respondent had engaged in protected First Amendment expression, whether individual Petitioners were entitled to qualified immunity, and whether there was sufficient evidence to proceed to trial, Respondent sought leave to file a cross appeal on the grant of summary judgment to Petitioners on two of three of Respondent's claimed First Amendment expressions. That request was denied by the Eighth Circuit and therefore the only claimed First Amendment expression before this Court is the expression which occurred on August 5, 1991 at a closed meeting of the Board of Aldermen in Blue Springs, Missouri.

Respondent submits that this Court does not have jurisdiction to review the order in question by writ of certiorari because none of the possible questions presented by the Petitioners concern conflicting decisions of courts of appeal or state courts nor do they bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaty or laws of the United States, nor have the Petitioners described any title, right, privilege or immunity as is being especially set up or claimed under the Constitution, treaty or statutes of the United States.

STATEMENT OF THE CASE[1]

Petitioners claim in their Statement of Facts at pages 2-3 that

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1. Appendix A consists of the Affidavit of Respondent Ronald Kincade referenced in the Eighth Circuit's Opinion of August 26, 1996 as Appellee's Supp. Addend. at B-6 at App. 5

the report of Respondent on August 5, 1991 was "made in the course of [respondent] performing a work assignment." This is an overbroad statement which is contrary to the record. (*See* App. 2a-7a ¶¶ 9, 12 through 19.) Additionally, although the decision of the District Court indicated that the Petitioners denied these statements were made at this meeting, the Record on Appeal demonstrated that several of the Petitioners recalled different aspects of Respondent's report. For example, Petitioner Morgan believed that when Respondent spoke at the August 5 meeting he was saying the dam might not be safe. Morgan also stated that Respondent stated that not all the dirt paid for by the City was in place at the dam and that consequently the dam was not as wide as was contracted for by the City with House. Morgan also stated that after Respondent was terminated, none of these issues regarding the dam were directed to the new City Engineer. A second Petitioner, Clark, recalls discussion by Respondent that "there wasn't the proper amount of dirt put on the [Waterfield] dam." Flynn, a BOA member but not a Petitioner, recalls some discussion about widening of the dam, certification, as built(s) [drawings of the dam], verification of the integrity of the dam and concern about "downstream safety". Ericson, a third Petitioner, recalls a meeting where Respondent discussed that House (the developer of Waterfield Dam and housing development) had not complied with the Development agreement.

The Statement of Facts is also silent as to events occurring —or not occurring — both before and after August 5, 1991 and prior to Respondent's termination which are key to an understanding of the issue. Prior to the August 5, 1991 meeting of Respondent with the BOA, Respondent had received a satisfactory rating and no indication that he was not performing as the BOA wished him to perform. The only issue that was raised to him by his supervisor Siems was that he needed to be more sensitive to the "P" or political factor. (*See* App. 3a, ¶ 10.)

Respondent contends at the August 5, 1991 meeting the BOA asked him to approach House with regard to the problems he had reported to them. Respondent did in fact do so on August 15, 1991. After that meeting, the BOA received pressure from developers over the Waterfield dam resulting in the calling by several of the BOA members on August 28, 1991 of a meeting to discuss possible termination of Respondent. (*See* App. 93-94.)

At the executive session on October 21, 1991 the BOA agreed to accept Waterfield Dam, over the objections stated by Respondent on August 5, 1991, and terminate Respondent. After this meeting, the issues raised by Respondent on August 5, 1991 and after that about Waterfield Dam were never raised again by anyone in the City as of the time of ruling on Summary Judgment.

When Respondent asked for a reason why he was being terminated, he was told by the City Attorney, no reason would be given as it might give rise to liability on the part of the City.

REASONS FOR NOT GRANTING THE WRIT

I.

THERE IS *NO* CONFLICT IN THE CIRCUITS ON THE IMPORTANT AND RECURRENT ISSUE OF WHETHER A PUBLIC EMPLOYEE'S SPEECH MADE IN RESPONSE TO A SPECIFIC WORK ASSIGNMENT CONSTITUTES PROTECTED SPEECH "AS A CITIZEN UPON MATTERS OF PUBLIC CONCERN" UNDER THE FIRST AMENDMENT.

A. General Principles

Although generally Petitioners correctly state the law as it applies to government employees' First Amendment rights in the workplace, Petitioners would skewer the language of *Pickering*

v. Board of Education, 391 U.S. 563 (1968)—the right of a public employee as a **citizen**, in commenting upon matters of public concern—to infer that a public employee in responding to a work assignment can **never** have the benefit of First Amendment protection when he speaks about such matters **because** he will always be acting as an **employee** whose work can be scrutinized by his superiors thereby giving rise to a lawsuit by the employee if he believes he was unduly criticized for such assignment or discharged because of his response to said assignment. Petitioners claim that the Circuits are "split" over whether such a situation gives rise, as Respondent claims here, to a 1983 action. Respondent states there is no such split.

Rather, the Circuit Courts of Appeal since *Connick v. Myers*, 461 U.S. 138 (1983) have, as directed by this Court in that case, adopted a "case by case" approach on the basis of "the content, form, and context of a given statement, as **revealed by the whole record,**" of the capacity in which the employee is speaking. 461 U.S. at 147-48. A review of the cases cited by Petitioners clearly show that the Courts of Appeal have attempted to ferret out — using slightly different approaches in doing so — whether what the particular employee is talking about, the content of the speech — is focused upon a matter of "public concern" or a matter of "personal interest". When the **content, form and context** show the matter to be a matter of "public concern", then the Courts of Appeal have found the government employee to be speaking as a "citizen". However, when the **content, form and context** show the matter to be a mere personal matter, one of internal [as to the employee's department] meaning only, then the employee has been found to be speaking as a mere "employee".

To adopt the skewered interpretation of the Petitioners is to adopt a "per se" rule that government employees can never speak to a matter of "public concern" when they are responding to a work assignment because a supervisor may always take issue

with the presenter and the presenter may then always attack the supervisor on First Amendment grounds. No such "per se" interpretation of *Pickering* or *Connick* should be adopted by this Court. Nor should this Court adopt the opposite "per se" rule—that just because a government employee is responding to a work assignment and all government employee work deals with matters that are of "general public concern" that therefore such employee's "speech" is always protected by the First Amendment forever precluding that individual from being disciplined or discharged for the manner in which he carries out his work.

B. This Case Does Not Present A Substantial Question Which Has Not Been Resolved By This Court's Prior Decisions.

Petitioners would have this Court believe that the Eighth Circuit has adopted the latter "per se" rule in this case, and/or that other Courts of Appeal are adopting such a "per se" rule, which requires this Court to address the issue:

> under what "circumstances, if any[2], is a government employee's speech, made while performing or in the furtherance of a work assignment, entitled to constitutional protection."[3]

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2. This phrase — "if any" — clearly is the real agenda of the Petitioners in this case—to have this Court fashion a rule whereby there are no circumstances under which an employee who reports malfeasance, misfeasance or other wrongdoing attributable in whole or in part to those who gave him an assignment can ever claim the protection of the First Amendment. This "per se" rule has not been adopted by any Circuit although Petitioners would infer it has in fact been so adopted.

3. *See* Petitioners' Brief at 8, citing *Koch v. City of Hutchinson*, 847 F.2d

(Cont'd)

Rather, Petitioners seem to ignore this Court's clear direction in *Connick* that the way to distinguish whether an employee is speaking as a "citizen upon a matter of public concern" or as "an employee upon matters only of personal interest" is to look at the "content, form and context of a given statement, as revealed by the whole record." 461 U.S. at 147-148. When the cases post the 1983 decision in *Connick* are segregated from the pre *Connick* cases, one can see over the last 13 years a growing consensus among the Courts of Appeal of exactly what constitutes a "matter of public concern". The alleged "hodge podge" of approaches has resulted not as Petitioners' claim from a lack of clarity about the manner in which these cases should be reviewed, but from the directions of this Court, that each case must be taken on its own facts and analyzed on its own facts on a case by case approach. This is in fact required by the "standard of review" in First Amendment cases.

C. There Is *No* Conflict In The Circuits.

Petitioners make a blatantly false statement to buttress their ill-taken claim there is a "conflict in the circuits" in the application of the "form and context" language from *Connick.* Petitioners claim the Eighth Circuit ignored the "form and context" of Respondent's speech because Respondent only made his statements to the BOA in his capacity as an employee; and, that "he in no way attempted to expose alleged misconduct or to communicate anything whatsoever to the public."[4] To the contrary the Opinion of the Eighth Circuit (App. 4-5) as well as the Opinion of the Magistrate adopted by the District Court (App. 36-37) set forth the following statements that Kincade claimed to have made at the August 5, 1991 meeting:

(Cont'd)

1436, 1442 (10th Cir.) *(en banc), cert. denied,* 488 U.S. 909 (1988).

4. *See* Petitioners' Brief at pp. 9-10.

a. that the north end of the dam did not have required embankment materials;

b. that because the north end of the dam did not have the required embankment, the emergency spillway required by the design plans was not present thereby incurring the likelihood of erosion and reduced structural integrity of the dam;

c. that additionally, the emergency spillway was not constructed of concrete as required by the design plans thereby contributing to the potential of erosion of the dam;

d. that the design for the dam had called for a 50 foot width at the top; the City had contracted for an additional 10 feet to be added to the width of the dam, for a total 60 foot width, for the purpose of providing a crossing for the Adams Dairy Parkway; the dam was actually only 42 to 49 feet wide as of August 14, 1991;

e. that the City had paid $62,510 to House and Weatherstone in June of 1987 even though the work had not been completed;

f. that the dam had never been certified in compliance with the Development Agreement or the 1987 Geotech report; and,

g. that because of the inadequacies of the dam, that homes and residents in those homes

> downstream of the dam and within several hundred yards of the dam were at risk of flood damage and personal injury if the dam's structural integrity was compromised by erosion from the aforesaid inadequacies.

Petitioners claim the District Court and Eighth Circuit should not have **first** focused on the "content" of Respondent's alleged speech and its "hypothetical" interest to the public at large; but rather the District and Appellate Courts should have **first** determined whether it was made by an employee responding to a work assignment. The fallacy of this argument in construing *Connick* is crystal clear when the Respondent's actual **statement** is plumped down in front of this Court as it was before the District and Eighth Circuit. **In this case,** by **first** looking at the employee's statement both the District and Appellate courts could easily determine that Respondent's statement was made by the employee in his capacity as a "citizen" because the statement on its face is so clearly regarding matters of public importance (the malfeasance and/or misfeasance of BOA members and developers) and not related to the employee's own work performance, or the reporting employee's department's performance. Thus, by first reviewing the statement by the employee, the Court could then easily make the determination of whether Respondent was speaking as an "employee" or a "citizen".

This might not be so in all cases, however because as the Court in *Terrell v. University of Texas System Police,* 792 F.2d 1360 (5th Cir. 1986), *cert. denied,* 479 U.S. 1064 (1987) stated: "almost anything that occurs within a public agency could be of concern to the public . . . ." *Id.* at 1362. However, in those cases cited by the Petitioners as demonstrating there is a "conflict", there is a clear common thread—that the employee claiming the First Amendment protection was at the time of the alleged

protected "speech" speaking out on a matter that personally concerned himself as opposed to dealing with a matter which is at somewhat of a "distance" from the speech maker.

In this context, it is clear there is no "conflict in the circuits"[5] but rather a growing consistency in the Circuits that speech when centered on personal problems of the employee making the speech will not be considered protected speech, while speech made in the course of work speaking to malfeasance, misfeasance or other matters of public importance not touching upon the individual speech maker, will have the protection of the First Amendment. Although Petitioners claim there is a split in the Circuits because the Circuits analyze the cases on an "employee v. citizen" approach described as "content based" in *O'Connor v. Steeves*, 994 F.2d 905 (1st Cir.), *cert. denied*, 114 S.Ct. 634 (1993); a "contextual" approach based on the employee's subjective "intent"[6] in making the

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5. *See* cases collected by Petitioners at Footnote 2 at page 11 of brief: *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993) although involving complaints about sexual harassment, involved Morgan's personal sexual harassment complaint; *Gillum v. City of Kerrville*, 3 F.3d 117 (5th Cir. 1993) involved Gillum's personal employment issue; *Bausworth v. Hazelwood School District*, 986 F.2d 1197 (8th Cir. 1993) does not involve Bausworth as a result of a work assignment making a complaint about other government workers, but merely relates the concerns of others; *Thomson v. Schied*, 977 F.2d 1017 (6th Cir. 1992) deals with Thomson's internal office politics as opposed to something the public at large would consider important; *Marquez v. Turnock*, 967 F.2d 1175 (7th Cir. 1992) Marquez was complaining about policies affecting him and others in his department; *Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991) Coughlin complaining about internal office matters. The other cases are to like effect.

6. The *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985) line of cases cited by defendant at their brief commencing at page 13 and in Footnote 3 are therefore no different than the cases cited at Footnote as following *Terrell*. In both circumstances when the focus is on the employee's personal agenda or internal politics the claim will fail.

speech; or a hybrid of the two when the speech would not necessarily qualify on the basis of its content alone as protected speech, there is in reality but one approach—a case by case analysis to determine whether the content of the speech is meant to be directed to a higher public good, or whether it is merely meant to foster a personal agenda of the speech maker. Attaching different "labels" to the analysis of the fact situation, does not make for a "conflict in the Circuits" as Petitioners here propose.

D. The Results In The Circuits Are Consistent With The Above Analysis.[7]

Although the Petitioners have carefully crafted their questions and argument to demonstrate there is a split in the Circuits—where in fact there is none—nothing demonstrates Petitioners' tactic better than this section of their brief.

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7. The Petitioners at Page 15 of their Brief raise the issue that "because of the unsettled state of the law, as evidenced by the foregoing cases, it is virtually impossible in many circumstances to predict whether a public employee's speech is protected, or indeed, even to predict the analytical framework that a court will employ in making the determination." Respondent would state that Petitioners have never contested in the lower courts the "analytical framework that a court will employ in making its determination". Petitioners below have only contested the result of the analysis—that the Courts have found that Respondent engaged in protected speech. Neither Petitioners nor Respondent are before this Court on testing the appropriate "analytical framework" to reach the answers to the questions posed by Petitioners. Petitioners are only here to determine whether the Courts did in fact reach the correct conclusion.

Petitioners have framed their entire argument so as to draw this Court into a fray which imposes one analytical framework on all courts to interpret these cases. *See Waters v. Churchill,* 114 S.Ct. 1878 (1994) (Scalia, J. concurring, joined by Kennedy and Thomas, JJ.) The analytical construct imposed by *Connick* in 1983 is more than sufficient. New procedural overlays only serve to complicate not simplify the process.

Petitioners argue that the **facts** in *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.) *(en banc), cert. denied*, 488 U.S. 909 (1988) and the **facts** in the case at bar are identical **because** in both cases the employees were responding to work related inquiries from superiors. Petitioners then go on to argue that despite the "identity" of the **factual** situations, the conclusions reached by the Tenth and Eighth Circuit Courts of Appeal were opposite, according to Petitioners, thereby definitively demonstrating to this Court that different approaches on the same **facts** lead to different conclusions requiring this Court's intervention to no doubt bring the Eighth Circuit's (errant) opinion in line with that of the Tenth Circuit's opinion in *Koch*. The fallacy of this argument lies in the definition of the "identity of facts".

It is not **how** the alleged protected speech came about—here both employees were responding to job related inquiries—but whether the employee's speech in response to the job related inquiry contains information that is important to the general public **and is not** related in whole or substantially in part to the employee's performance of the matter on which he is speaking. Respondent spoke about his investigation of what other's had done before him which he believed raised issues of misfeasance, malfeasance and possibly future harm to the public occasioned by some of the same Board members to whom he was then reporting. In *Koch* the employee was reporting on what he himself had found, and it was questioned whether he was properly acting at the time. In *Koch*, Koch himself was the focal point of the inquiry. In *Kincade*, as in other cases where First Amendment Protection has been found, Kincade is not the focal point but as the Eighth Circuit stated (citing *Connick* at 147-48) at App. 11:

> The focus is on the role that the employee has assumed in advancing the particular expressions: that of a concerned public

> citizen, informing the public that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with internal policies or practices which are of relevance only to the employees of that institution.

Petitioners by focusing on how the speech comes about, and then looking at the conclusion in *Koch* and *Kincade* then reach the conclusion that the Eighth and Tenth Circuit decisions could not have used the same analysis and therefore the analysis is flawed. That is not the case. Both the Eighth and Tenth Circuits used the same analysis as set out in *Connick* above: whether Koch and Kincade were informing the public about the state institution not properly discharging its duties or whether they were merely talking about internal policies or practices. In *Koch* the Tenth Circuit found Koch was focusing on internal policies or practices, while in *Kincade* the Eighth Circuit found that Kincade focused on public wrongdoing. Both decisions are consistent with *Connick* although reached through different analyses.

The protection afforded Kincade's speech was to be expected. It falls within the first type of case recognized by *O'Connor* that where the content of the speech clearly identifies the speech as protected there need be no further analysis. *Koch* falls clearly in the second class of cases, where although he speaks on a matter of some public concern, it is the speaker's intent which clarifies that the speech is not covered by the First Amendment.

The Eighth Circuit in *Kincade* has not fashioned a "per se" rule which raises the scepter of "potential government liability

for almost any adverse employment decision" as Petitioners claim. Rather, *Kincade* is but another in a long line of cases which protects government employees from retaliation[8] for bringing to light matters of public concern. For these reasons Petitioners' Writ should be denied on its initial question to this Court.

II.

THE RIGHT ALLEGEDLY VIOLATED IN THIS CASE *WAS* CLEARLY ESTABLISHED AT THE TIME OF THE GOVERNMENT OFFICIALS' ACTIONS AND, BY DENYING THE OFFICIALS QUALIFIED IMMUNITY PRIOR TO TRIAL, THE LOWER COURTS DISREGARDED THIS COURT'S DECISION IN *HUNTER V. BRYANT.*

While Petitioners claim they are relying upon *Hunter v. Bryant,* 502 U.S. 224 (1991) (*per curiam*) for their claim that the right allegedly violated in this case was ***not*** clearly established at the time of the BOA's decisions in 1991 and therefore the lower courts improperly denied the individual Petitioners' qualified immunity, in fact their argument is as stated before the Eighth Circuit en banc in their Petition for Rehearing and Suggestion for Rehearing en banc: that because they and other defendants in 1983 actions have raised questions as to whether a particular circumstance is "clearly established" that does in fact mean the issue is "debatable" and therefore because it is "debatable" it cannot be "clearly established". Such circuitous "logic" borders on the frivolous but certainly has no basis in any appellate court decision that appellants or appellee have been able to locate on "qualified immunity". Under such a "rationale" a court could

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8. Of course, Kincade must still prove that his speech did in fact cause his termination.

never find "clearly established", which no doubt is the goal of all defendants who have been denied "qualified immunity".

As the Eighth Circuit stated at Petitioners' Brief, App. 19:

> We likewise disagree with the Appellants' argument that they are entitled to qualified immunity because the state of the law was unclear with respect to whether a public employee can be speaking on matters of public concern when the speech is made in his capacity as a public employee. At the time of Kincade's termination, the cases made clear that speech touches upon a matter of public concern when it deals with issues of interest to the community. *Connick*, 461 U.S. at 146, *Cox*, 790 F.2d at 672. As noted above, Kincade's speech clearly addressed issues that the public would be interested in, not issues that have some personal interest only to Kincade.

Petitioners seem to believe that merely because there is "debate" among the Circuits or even within the Circuit about the application of 1983 to a government employee speaking as an employee, this translates to a lack of "clearly established" principles. But *Connick*, decided in 1983, was and remains very clear about what is protected speech. The dichotomy which Petitioners see—based on a skewered view of the law concocted so as to create a conflict—is but a facade. No one who directs his attention to what Kincade said on August 5, 1991 can state that such speech was not clearly speaking about a matter of public concern.

Petitioners see "conflicts" between *Bausworth* and *Mumford v. Godfried,* 52 F.2d 756 (8th Cir. 1995) where the Eighth Circuit sees none. In *Mumford* the Eighth Circuit showed how *Bausworth* was in fact consistent with prior decisions. Lawyers trained in the "turn of the phrase" can always find new "spins" to put on factual situations to conjure up visions that the law is not settled and therefore courts must intervene to "clarify" the situation. But here, as in so many cases, the "lawyers" have overreached.

Respondent Kincade's constitutional exercise of the Free Speech Clause protects him from retaliation. A reading of what he claims to have said to the BOA in August of 1991 demonstrates facially that all but the most incompetent should have known he was so exercising his First Amendment rights. Petitioners' second question on appeal should therefore be denied.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — AFFIDAVIT OF RON KINCADE

STATE OF MISSOURI)
)
COUNTY OF JACKSON)

I, Ron Kincade, do state upon my oath:

1. That I applied for the position of Director of the Department of Public Works/City Engineer advertised by City.

2. That in deciding whether I wished to go to the City as Director of the Department of Public Works/City Engineer, it was important to me to know whether the BOA would support enforcement of the subdivision ordinances and not "bow" to the pressure of developers in the City.

3. That during my interview with Siems and the BOA I specifically asked whether the developers in the City had any "clout" with the BOA with regard to enforcement of subdivision ordinances; that I was informed and assured that they did not, and that the BOA expected me to enforce the subdivision ordinances for the City.

4. That I was thereafter offered the position of Director of the Department of Public Works/City Engineer by the BOA; and based upon the representations made to me by some members of the BOA that they would support me in my enforcement of City ordinances, I accepted the position offered me.

5. That shortly after I went to work, House and I had a difference of opinion about the display home ordinance section; at that time House told me, in the presence of Beaty, that if I did not do what the developers wanted, he would make a few telephone calls and I would be gone.

Appendix A

6. That thereafter I reorganized the Department of Public Works/City Engineer and put in place procedures to ensure the orderly handling of projects by my department, and also procedures to ensure that the Subdivision ordinances were in fact consistently interpreted by me and my Department and followed by developers and builders in the City.

7. That with the institution of the new procedures in Engineering to ensure the orderly handling of projects and consistent enforcement of Subdivision ordinances I became aware of "complaints" from developers and builders that the City and particularly Engineering was "not responsive" to the developers and builders, that Engineering was "causing delays" in the procurement of permits; that Engineering was "changing interpretations"; that Engineering was "not cooperative"; that Engineering "required changes to plans on multiple occasions"; these complaints were voiced to either me directly or I was told about them by others in my department or in the City.

8. That members of the BOA, Grounds and Siems made little if any inquiry of Engineering, including myself, either directly or through Siems, to determine the underlying reasons for the complaints, including whether they were the result of my enforcement of city ordinances as required by the BOA, Grounds and Siems.

9. That shortly after I came to work for the City, I was advised through a "Citizen Request form" that BOA member Ericson had made an inquiry as to whether Waterfield Dam was structurally capable of supporting Adams Dairy Parkway; this inquiry required me to research the entire history of the dam, and resulted in an investigation which encompassed matters beyond the original inquiry of Ericson but were vital to an understanding

of the current situation as well as status of the dam, and which raised engineering issues as well as contractual issues which required resolution.

10. That in June of 1991, approximately one year after my hiring, I was given my annual review by Siems; that during that interview (as well as other times) Siems told me I should be sensitive to the "P" factor (political factor) in making decisions; but I was not informed by Siems that the BOA was displeased with me in any way, my department, the responsiveness of my department to citizen inquiries, or my department's enforcement of City ordinances; that I was given an overall "good" evaluation which was accompanied by a recommendation that I receive a pay increase which was comparable or above that given other department heads for the fiscal year.

11. That I contend such complaints were the result of my actions in enforcing the City's ordinances as required by the BOA, Grounds and Siems and that therefore my actions in enforcing the City ordinances constitute a First Amendment expression deserving of First Amendment protection.

12. That as a result of my review of City documents I determined that in 1987 the City, through the BOA, of which House was then a member, approved the construction of Waterfield Dam, hereinafter referred to as "dam", by Weatherstone, contingent upon said dam meeting the requirements set forth in the E.J. Werner & Associates', hereinafter referred to as "E. J. Werner", hydraulic and hydrologic report and the Alpha-Omega Geotech, hereinafter referred to as "Geotech", reports.

13. That I also determined from my investigation that in

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1987 Siems, as City Administrator, without the required authority of the then BOA, approved payment to Weatherstone and House of $62,510 for the purpose of widening the dam from its specification width of 50 feet to a proposed width of 60 feet so that Adams Dairy Parkway could in the future be constructed on the dam.

14. That on March 15, 1991 I informed Siems, by memorandum, of the problems I saw with the construction of the dam, and consequently my inability to approve the final plat of Waterfield; I also informed Siems that if House and Weatherstone were not made to comply with the original specifications for the dam at this time, the City would have no authority after the final approval of the 6th Waterfield plat to make House fulfill the original requirements.

15. That on March 21, 1991 Weatherstone and the City, through the mayor, signed the Development Agreement, after changes were made by the BOA of which I did not approve, and the final plat of Waterfield was approved contingent on fulfillment of the terms of the Development Agreement.

16. That during the next months as part of my continuing investigation on the Waterfield Dam and in an attempt to determine whether House had met the requirements of the March 21, 1991 Development Agreement, in accordance with directions from the BOA, I determined:

a. that the $62,510 paid to House and Weatherstone had not been presented for approval to the BOA in accordance with City ordinances;

b. that the monies had been paid to House and

Weatherstone even though the work had not been completed by House and Weatherstone;

c. that it was not possible to determine with 100 percent accuracy whether the dam had been built according to the approved designs;

d. that the required emergency spillway had not been built and that consequently the dam posed a potential safety hazard to the homes downstream; and

e. that although the Development Agreement provided that certification of the dam be provided by Weatherstone within 45 days of the signing of the Development Agreement, that certification had never been provided the City at any time although I sought to obtain same from House and Weatherstone on numerous occasions;

f. that Geotech, in April of 1991, only certified that the dam was designed in compliance with state standards, but did not certify the dam, as built, was in compliance with the design approved by the City as set forth in the March 21, 1991 Development Agreement.

17. Although I was not requested to direct my attention to all of these issues, these issues were addressed by me in an attempt to address all the issues associated with the "structural" aspect of the dam and the City's dealings with the developer on the Dam.

18. That I informed Siems during the summer of 1991 that City procedures regarding the $62,510 paid to House and Weatherstone had not been complied with.

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19. That on August 5, 1991 at a meeting of the BOA, I responded to Ericson's inquiry as well as presenting the additional problems with the dam which I had determined as a result of my thorough investigation of the dam and the dealings of the City with House. These "problems" consisted of:

a. that the north end of the dam did not have required embankment materials;

b. that because the north end of the dam did not have the required embankment, the emergency spillway required by the design plans was not present thereby incurring the likelihood of erosion and reduced structural integrity of the dam;

c. that additionally, the emergency spillway was not constructed of concrete as required by the design plans thereby contributing to the potential of erosion of the dam;

d. that the design for the dam had called for a 50 foot width at the top; the City had contracted for an additional 10 feet to be added to the width of the dam, for a total 60 foot width, for the purpose of providing a crossing for the Adams Dairy Parkway; the dam was actually only 42 to 49 feet wide as of August 14, 1991;

e. that the City had paid $62,510 to House and Weatherstone in June of 1987 even though the work had not been completed;

f. that the dam had never been certified in compliance with the Development Agreement or the 1987 Geotech report; and,

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g. that because of the inadequacies of the dam, that homes and residents in those homes downstream of the dam and within several hundred yards of the dam were at risk of flood damage and personal injury if the dam's structural integrity was compromised by erosion from the aforesaid inadequacies.

20. I consider this an expression of my first amendment rights.

21. On August 15, I met with House, (together with Beaty and Kuntz) at the direction of the BOA at the August 5 meeting, to discuss the "problems" that I had relayed to the BOA on August 5. House told me at that time that the City would have to sue him to get him to do anything with the dam.

22. That later in September, I again approached Siems and informed him that House was still in violation of the Development Agreement with the City; but Siems told me it was up to Grounds and the BOA to determine whether any action would be taken to enforce the Development Agreement with House.

23. That at no time after August 28, 1991 did Siems come to me and tell me that the BOA had had a meeting to discuss my performance, nor did he tell me that BOA members had expressed to him that I should improve my communication skills with them, the citizenry of Blue Springs, or those who did business with the City, nor did I hear from Siems orally or in writing that the BOA perceived I had some performance problems that needed resolution.

24. On October 10 Siems asked me to provide him a copy of

the Development Agreement with House. Calhoun, my secretary, told me that Grounds had told her to provide him with a copy of the Development Agreement.

25. That same day I went to Siems' office and I asked Duff, City Clerk, if Siems was available. I was told by Duff that Siems was in a meeting with Grounds and House. I looked at Siems' office and his door was closed. I believed this meeting was intended to resolve the City and House's disagreement over the dam by circumventing my professional engineering objections concerning the dam as City Engineer because:

a) I had been asking Siems since August 5 on numerous occasions, and as recently as early October, about the resolution of the Dam issue because I knew the dam issues had not been resolved, but Siems had told me the Mayor and the Council would have to resolve the issue; and

b) Siems and Grounds had asked for copies of the Development Agreement immediately prior to this meeting; and,

c) I had not been told about nor asked to attend the meeting of House, Grounds and Siems.

26. During the following weekend, I started to become concerned, based upon my belief that at the meeting of House, Grounds and Siems on the 10th the Mayor and Siems "cut a deal" with House not to follow through with my recommendations, and that consequently the City did not have, and would not have, authority to use Waterfield Dam as a detention basin for subdivisions upstream such as Waterfield North or Fox Trail.

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27. On October 14, 1991 in preparing for agenda items for the Planning Commission meeting that night, when I saw that the plats for Waterfield North and Fox Trail were on the agenda, I became concerned about the repercussions of House's recent refusal to comply with the Development Agreement and the absence of a response from the BOA to enforce the Development Agreement, as well as the recent meeting of October 10 including:

a. how such refusal affected developers who were presenting for approval that night storm water detention plans which utilized Waterfield Lake as a detention facility; and

b. how permitting such developers to use Waterfield Lake as a storm water detention facility might expose the City to damages and liability because Waterfield lake and dam had not been accepted by the City as of that date because the lake and dam were not in compliance with subdivision ordinances regarding a water detention facility.

28. That I approached Siems on the morning of October 14 regarding the problems and Siems indicated that we should discuss the issue with Grounds prior to the Planning Commission meeting; Grounds however was not available for a meeting until late that afternoon.

29. That immediately prior to the Planning and Zoning Commission meeting on October 14, Grounds met with me and Siems; that I brought up the problems that I saw; that Grounds thereafter led the discussion that there was a potential for City liability; as we were getting ready to leave I asked Grounds how

he wished me to handle the matter; *in response to my question,* he requested me to withdraw my recommendation to the Planning Commission that the plats of other developers who were to discharge into the Waterfield Lake be approved as long as they agreed to escrow $200 per lot and told me to get in touch with Kuntz, McDonald and the Developers. I told him, given the late hour, I would do what I could.

30. As the meeting recessed late, I was unable to reach any of the individuals. When I got to the Planning and Zoning meeting, I informed Kuntz that I would withdraw the recommendation as he and I had discussed earlier in the day; I briefly mentioned the matter to McDonald but was unable to talk to the developers.

31. That I had no meeting with Grounds and/or Siems on October 11 at any time as alleged by Grounds in his affidavit and deposition.

32. That at the Planning Commission meeting I explained that I had to withdraw my department's recommendations for certain plats because it had become clear that such recommendation might expose the City to liability because the City had not accepted the dam and lake as a water detention facility as yet; that at the request of the chairperson of the Planning and Zoning Commission meeting, I told the Planning and Zoning Commission meeting that it was up to the Mayor and the BOA to enforce the Development Agreement with House.

33. That thereafter a vote was taken on the plats and I was the lone dissenting vote; Grounds did not support me although he had admitted to me privately late that afternoon that BOA approval would expose the City to liability and had openly

expressed during the Planning and Zoning Commission meeting that water should not be put behind the dam.

34. That I contend my discussion at the Planning and Zoning Commission meeting regarding Waterfield Dam, my withdrawal of recommendation of certain plats and my laying blame at the feet of the Mayor and BOA for the failure to require House to complete the construction of the dam in accordance with the approved plans and fulfill the requirements of the Development Agreement constitutes First Amendment expression deserving of First Amendment protection because the withdrawal of recommendation was done at the direction of the Grounds, and the laying of blame was done in response to inquiries from the Chairperson of the Planning and Zoning Commission, and because he raised matters of public concern to the BOA, including (by inference) the potential negligence of prior BOA members and Grounds in the following regards:

a. that BOA members after 1987 failed to follow through to determine whether House and Weatherstone had in fact built the dam as approved in the plans;

b. that BOA members after 1987 had allowed the dam to exist without an emergency spillway which posed a potential downstream hazard.

35. After the October 14 meeting and before I was terminated, Siems came to my office and closed the office doors and told me that the Mayor had told him that a large group of developers were coming to the BOA meeting (coming up) to demand my termination. I asked him if they had the votes and he said he did not know. I then asked him how he would respond to a question about my performance and he said that I was doing my

job and if someone on the Board didn't think so they should tell me.

36. That at no time did Grounds, Siems, Ericson, Clark, Morgan or Spears ever indicate to me that I was disloyal, that they could not work with me, that my actions reflected poorly on the city, or that my first amendment expressions as indicated above were "frustrating" the efficiency of my department.

37. I was not instructed by Siems at my performance review to pay *immediate* attention to: meeting deadlines, my alleged inability to consider alternatives to situations, my need to work on interpersonal skills, my alleged inability to be flexible, my alleged refusal to compromise scheduling of one project for another project, my allegedly harsh delivery style with communicating with others, my alleged defensiveness, my alleged inability to admit I am wrong, my alleged poor relationship with peers in other departments. Rather these were topics that were discussed in an overall good performance evaluation, and were merely items he expressed that I needed to improve upon.

38. I was never rude to any citizen who made inquiry of me.

39. I never had a BOA member or any City employee tell me they could not get along with me, that I was disloyal to the BOA or the City, or that I did not communicate with them well.

40. I do not recall any instance where I failed to turn in a report to the Planning Commission; there were some instances where the Planning Commission report did not contain the City Engineer's comments but these were provided at the Planning Commission meeting.

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41. I know of no meetings that Mr. Warren Parker scheduled with me or for which he requested me to be personally present which I did not attend.

42. I never failed to return telephone messages which I received. There were times when I returned the message that the individual was not available. There were also times, of which I am aware, that I did not get messages because the telephone calls were routed elsewhere and neither I, nor others in Engineering, got the message.

43. During my tenure at the City, I and my staff consistently interpreted and enforced the City ordinances, subdivision regulations and standards as adopted by ordinance as they were written.

44. All plans that came to Engineering were completely reviewed initially and all incompletions and all corrections that could be noted at that time based on the degree of completion of the plans submitted were made known to the builder and the builder's engineer; if there were items which were not on the plans or were incorrect, the plans would be returned for completion and/or correction by the builder's engineer; if the returned plans still were not complete and/or correct, then this would require the plans to be returned a second, (and sometimes a third or more), time to the builder's engineer for completion and/or correction of new items on the plans. It was the incompletion and or incorrect items which caused the delay in the processing of the plans, not Engineering's review of the plans. At the request of Siems, this was not done on the Blue Springs Bank project but was made known to Blue Springs by letter at the time of the initial partial review of plans.

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Further affiant saith not.

_____

Ron Kincade

Subscribed and sworn to before me this 12th day of September, 1993 before me the undersigned notary public in and for the above county and state.

_____

Notary Public

My commission expires: